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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

THYME HOLDINGS, LLC D/B/A
WESTGATE GARDENS CARE CENTER

Employer

and

Case No. 32-RC-183272

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 2015

Union-Petitioner

EMPLOYER'S REQUEST FOR REVIEW

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I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Pursuant to Section 102.67 of the Board's Rules and Regulations, Thyme Holdings, LLC d/b/a Westgate Gardens Care Center (hereinafter "Employer") seeks review of the Decision and Direction of Election (hereinafter "Decision") issued by Acting Regional Director Valerie Hardy-Mahoney on October 27, 2016, ordering that an election be held for the Licensed Vocational Nurses (hereinafter "LVNs") to vote on whether they wished to be represented by Service Employees International Union, Local 2015 (hereinafter "Union").

Review is required because the Acting Regional Director (1) departed from established Board precedent in concluding that the LVNs were not supervisors and established a new evidentiary standard that employers are required to meet; (2) made clearly erroneous factual findings to support her conclusion; and (3) denied the Employer a fair hearing in contravention of the Board's Rules, the Rules of Evidence, and the United States Constitution.¹

Stated simply, the unrefuted record evidence demonstrated that the LVNs exercised four enumerated Section 2(11) powers such that they are statutory supervisors. In reaching the contrary conclusion, the Acting Regional Director (hereinafter "RD") rejected the Employer's uncontroverted evidence because the Employer did not "corroborate" that evidence with the testimony of an LVN -- even though no Board rule nor any Federal Rule of Evidence requires such corroboration or authorizes evidence to be disregarded for lack of corroboration. Quite clearly, the RD "invented" this new evidentiary rule out of whole cloth so that she could disregard the record evidence and conclude that these LVNs were employees, not supervisors. Moreover, the RD's error is compounded by the fact that the Hearing Officer -- in clear contravention of Board authority -- denied the Employer the opportunity to adduce relevant

¹ A hearing was held in Oakland, California on September 13 and 14, 2016. "Tr." Refers to the hearing transcript followed by a page reference. "EX" refers to the Employer's Exhibits and "PX" refers to the Union's Exhibits.

evidence to support its legal position. The simple truth is that the RD decided how she wished the issue to be resolved and then wrote her decision to confirm her conclusion.

II. STATEMENT OF FACTS²

The Employer operates a 140-bed skilled nursing care facility in Visalia, California that provides both short and long-term care to patients. The facility is a one-story building with two main corridors – off of which are patient rooms. There are three nurses' stations, each of which is responsible for approximately 25 patient rooms. The facility also includes a main patient dining room, a second dining area for patients, a common employee break room, a therapy room, a kitchen, laundry area, a medical records office as well as some other administrative offices. (EX 1.)

The Employer provides patients with *24-hour a day, seven-day a week* nursing care along, where necessary, assistance with eating, bathing, toileting, and physical, occupational and speech therapy. There are 22 full time Charge LVNs and 15 on-call or *per diem* Charge LVNs. The *per diems* only work when a regular full time Charge LVN is absent. In other words, *the per diem LVN substitutes for a full-time LVN* who is absent for one reason or another. (Tr: 227.) The Charge LVNs work 3 twelve-hour shifts.

The Charge LVNs supervise approximately 90 full time, part-time, and on-call certified and restorative nursing assistants (hereinafter jointly referenced as "CNAs"). The CNAs ensure that patients are comfortable and that their physical needs are met. They provide 24/7 care, involving the positioning and repositioning of patients, getting patients out of bed, and assisting patients with feeding, bathing and toileting. The CNAs also deliver and pick up meal trays and laundry from resident rooms. In contrast to the LVNs, the CNAs work on three 8-hour

² This Statement of Facts is taken from the RD's Decision. Additional facts are indicated by a transcript page reference. The more important facts that the RD distorted or ignored are set forth in the Argument section of this Brief with an appropriate transcript reference.

shifts starting at 6:30 a.m.

During the 12-hour LVN shift, there are two Charge Nurses assigned to each of the three nurses' stations, or a total of six floor nurses on duty. (Tr: 32.) Significantly, some of these Charge Nurses are Registered Nurses, not LVNs. The facility has approximately 8 Registered Nurses who perform work *identical to the work performed by the LVNs* and who are subject to *the same job description*. (EX 1, p. 3; EX 14, p. 1; Tr: 32.)

The Charge Nurses report to two Assistant Directors of Nursing (hereinafter "ADONs") and to the Director of Staff Development (hereinafter "DSD"). (EX 2.) The ADONs and DSD report to a Director of Nursing (hereinafter "DON") who, in turn, reports to the facility Administrator. *Id.* The ADONs and the DSD are LVNs while the DON is a Registered Nurse.

The Administrator, DON, ADONs, and DSD normally are present in the facility only during the day and are not present after 6 p.m. or on weekends. (Tr: 14, 25-26.) Currently, from approximately 6 pm to 6 am, and throughout the entire weekend, the highest-level supervisor in the facility is, and has been, the Charge LVN. (Tr: 14, 25-26, 156.) Or, in other words, *for 132 hours out of a total of 168 weekly operating hours, the Charge LVN is the highest-level supervisor in the facility.*

III. ARGUMENT

A. THE EMPLOYER'S EVIDENCE DEMONSTRATED THAT THE FACILITY LVNs WERE STATUTORY SUPERVISORS UNDER THE ACT.

The Employer contended that its supervisors exercised various of the enumerated Section 2 (11) powers -- although the exercise of only one is sufficient to prove the supervisory status of a class of employees. *Oakwood Healthcare*, 348 NLRB 686 (2006). While the evidence was strongest that the LVNs had the authority to "reward" employees -- by determining the amount of their wage increases -- there was also more than sufficient evidence to conclude that the LVNs (1)

played an integral part in the hiring process, (2) assigned work, and (3) disciplined the CNAs they supervised. Because the evidence that the LVNs determined the CNAs' wage increases was clear, unequivocal, and undisputed, this Brief will primarily analyze that issue, and then concisely summarize the other Section 2 (11) powers exercised by the LVNs.

1. THE LVNs EVALUATED THE CNAs AND THE CNAs' DIFFERENTIAL WAGE RAISES WERE BASED ON THOSE EVALUATIONS.

Unquestionably, where a performance evaluation results in a wage increase, the individual who does the evaluation is a statutory supervisor. *E.g., Willamette Industries, Inc.*, 336 NLRB 743, 744 (2001). Here, that is precisely what the record evidence showed:

- In July 2016, the LVNs were told, either in-group meetings or individually, that their job description was being modified to require that they review and evaluate the CNAs with whom they worked. They were told *their evaluations* would affect the amount of raises each CNA received. *The CNAs were given this identical information.* (Tr: 42-43, 48-51, 154, 303-304.)³
- The revised July 2016 LVN job description provided that one of the "Essential Job Functions" of the LVN position was: "Perform performance evaluations for staff, including determination of wage increases if applicable." (EX 3.)
- In July and August 2016 the LVNs in the facility completed performance evaluations of all of the CNAs (other than a few CNAs that had just started work). (EX 7.)
- When they did the evaluations, the LVNs were fully aware that their evaluations would affect what wage increase was given to the evaluated CNA. (Tr: 42-43.)

³ For point of reference, the Union's representation petition was filed on August 31, 2016, and all of these described actions took place prior to the filing of the petition.

- The particular LVN assigned to do the evaluation was selected by the DSD based on the DSD's assessment of which LVN was in the best position to evaluate the CNA. (Tr: 159-161, 237.)
- The LVNs were given no training or guidance concerning how to complete the evaluations; they used their own independent professional judgment to evaluate the CNAs based on the six enumerated factors listed on the evaluation form. (Tr: 161.)
- The completed evaluations were scored by the DSD to ascertain if the CNA received an overall rating of excellent, good, satisfactory, fair, or poor. (Tr: 165-166.)
- Neither the DSD nor any other management official independently reviewed or re-did the evaluations. (Tr: 166.)
- 65 CNAs were evaluated by 19 different LVNs. (EX 8.)
- Of the 65 evaluated CNAs, 21 were evaluated as "excellent" and received a 3% wage increase. (EX 7.)
- Of the 65 evaluated CNAs, 35 were evaluated as "good" and received a 2% wage increase. (EX 7.)
- Of the 65 evaluated CNAs, 9 were evaluated as "fair" and received a 1% wage increase. (EX 7.)
- The performance reviews were clearly meaningful in distinguishing between the various CNAs and rewarding the CNAs based on the quality of their work. The CNAs all received these wage increases. (Tr: 153-154, 169-170.)
- Significantly, the LVNs and CNAs were told that this evaluation process *would be ongoing and that as each CNA hit his or her "hiring anniversary date", the CNA would be evaluated by the LVNs and given a wage increase based on those evaluations.* (Tr: 154.)

Confronted with this evidence, RD decides to ignore it because the Employer did not “corroborate” the testimony given by the Administrator Eric Tolman and DSD Kulsum Hussain with either supporting documents or testimony from LVNs or CNAs. The RD stated:

“However, the Employer did not call any LVNs as witnesses to corroborate the testimony of Tolman that the Employer informed LVNs that their future evaluations of CNAs would impact CNA raises. ... With respect to the other Employer meeting with CNAs that took place on an unspecified date in July, I note that the Employer failed to call as a witness any CNA to corroborate Tolman’s account of the meeting. Nor did the Employer offer into evidence any sign-in sheets for any mandatory or non-mandatory staff meetings despite the Employer’s usual practice of having attendees sign in on such sheets at meetings they attend.”

* * *

“The Employer’s conclusory testimony that the LVNs prepared evaluations which led to 1% raises for those CNAs deemed fair, 2% raises for those CNAs deemed good, and 3% raises for those CNAs deemed excellent has not been substantiated given the lack of document evidence in the record.”

“Finally, I note that the Employer failed to offer any payroll records into evidence to substantiate its claim⁴ that the CNAs actually received pay increases as a result of their recent evaluations. The Employer’s failure... is fatal to its argument...”

(footnotes omitted) (Decision pp. 9-10, 12.)⁵

⁴ To aid in her erroneous conclusion, the RD uses the word “claim” to make it appear that this was a legal argument and not evidence. In truth, there was testimonial evidence. (Tr: 153-154.) That evidence, unrebutted, was sufficient under the Federal Rules of Evidence, and the RD is not free to require documentary proof as well, merely because the evidence came from the mouth of the Employer.

⁵ In disregarding this evidence, the RD also ignored the uncontradicted evidence that when the Employer gave the LVNs this additional authority, it simultaneously increased each of their wage rates by 1% to compensate for the new workload. (Tr: 126-127.) Why would the Employer have done this – a fact confirmed by LVN Gonzales (Tr: 380) -- if it had not taken the actions testified to by Administrator Tolman? In addition, the RD ignores the fact that each of the LVNs *was required to sign a copy of the new job description*, acknowledging receipt, which set forth their new duties and responsibilities and which clearly states that CNA evaluations, done by the LVNs, would result in the CNAs’ wage increases. (Tr: 37-40, 118-121; EX 3.) The RD conveniently ignores this testimony as well as the supporting *documentary evidence* even though the Union’s LVN witness, Gonzales, confirmed it. (Tr: 366-369.)

For numerous reasons, the RD's reasoning is staggering. First, (even if the Federal Rules of Evidence were applicable, which they are not), there is no rule of evidence that requires "corroboration". *Under the RD's reasoning, testimony from an employer representative is to be disbelieved, on its face, unless it is corroborated by an employee or by documents.* Employees can be trusted to tell the truth but supervisors and managerial agents must have their testimony corroborated.⁶ Moreover, the Federal Rules of Evidence do not contain an evidence "hierarchy", such that documentary evidence is preferred over testimonial evidence. Under the Rules, evidence is evidence. The RD's attempt to carve out her own rules of evidence should be rejected. The RD had no legal basis for ignoring the record evidence.⁷

Second, the Union had present at the hearing four LVNs, only two of whom were called to testify. (Tr: 5, 224.) The two called witnesses did *not* contradict any of these relevant facts, and the Union chose not to call any of the other individuals to testify.⁸ Thus, although rebuttal testimony was clearly available, *if it existed*, none was put into evidence.

Third, the Hearing Officer blocked the Employer from adducing any supporting evidence. When the Employer's counsel sought to question LVN Gonzales, the Hearing Officer refused to let counsel question the witness about any subjects not covered on direct examination even though such a limitation is not proper in an "R" hearing. (Tr: 450-459.)⁹

⁶ As a matter of fairness and constitutional due process, if the RD was going to create a new rule of evidence, the Hearing Officer was required to inform the Employer so that it could seek to meet the RD's evidentiary standard.

⁷ Indeed, the RD cites no legal authority for her newly created rules of evidence.

⁸ LVN Gonzales could not rebut what was said to the LVNs as a group, or individually, nor what was said to the CNAs because he was not present for any of those meetings. (Tr: 313.) The second Union witness was not questioned about any substantive matters. (Tr: 461-463.)

⁹ Not only are the Federal Rules of Evidence not applicable in a "R" case hearing, but the Board's

Fourth, if the Hearing Officer had any doubts on any of these issues, to wit, he believed that the Employer's evidence required corroboration; he was under an *independent obligation* to ensure that the record was "complete". The Board's Guide is crystal clear on this points stating:

"The hearing officer may cross-examine and call and examine witnesses. ... It is the *obligation of the hearing officer* to ask follow up questions and *to obtain specific examples when the parties elicit generalized testimony regarding matters in issue*. If the parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. ... *Where necessary to ensure the development of a record that is complete, concise and cogent*, it may become necessary for the hearing officer to interrupt the presentation of a party and conduct some or all of the questioning of a witness or witnesses." (Guide, p. 7.) (emphasis added.)

Suffice it to say, that the record demonstrates that the Hearing Officer did none of these things while simultaneously precluding the Employer from introducing relevant evidence by erroneously sustaining an objection that counsel's questions were "beyond the scope of direct examination". Then, the RD uses this faulty record to assert that relevant corroborative evidence is lacking.¹⁰

own manual clearly states: "Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. *This has no application in R case hearings*. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, *regardless of whether the subject was raised on direct examination*." Guide for Hearing Office in NLRB Representation and Section 10(k) Proceedings, p. 37 (emphasis added). Moreover, in her Decision, the RD asserted that, in any event, the Employer failed to make an offer of proof. But, here again, not only is such an offer unnecessary because the Federal Rules of Evidence do not apply, but just as significantly, the Federal Rules do not require an offer of proof where the substance of the evidence is clear from the context. Federal Rules of Evidence, Rule 103(a)(2). Here, the Employer sought to adduce evidence going to the supervisory status of the LVNs, not evidence with respect to one particular aspect and the RD not only cut off the evidence but then asserted that the Employer's failure to adduce the evidence was a basis for disregarding the evidence submitted.

¹⁰ It bears adding that the Hearing Officer, in conjunction with the Assistant Regional Director ("ARD") who entered the hearing room near the end of the second day, made additional erroneous rulings that were prejudicial to the Employer. When the Employer sought to call an LVN who was present in the room as a rebuttal witness, the Union's counsel "instructed" the witness to leave the

Having chosen to affirmatively disregard the record evidence, the RD then resorts to irrelevant facts to support her conclusion.

- The RD states that there is no evidence that the LVNs played any role in determining which specific LVNs to evaluate -- a fact that is irrelevant to whether the LVNs did the evaluations and whether the evaluations were the basis for the CNAs' wage increases. (Decision p. 10, n. 9.)
- The RD states that in doing the evaluations, the LVNs did not look at the CNAs' personnel files. (Decision p. 10 n. 10.) Again, irrelevant. The LVNs were asked to evaluate the performances *they observed*, a decision that the Employer was legally free to make. Moreover, there is no evidence as the existence of any evidence in the CNAs' personnel file that would be of assistance in evaluating the CNAs' work performance. This is pure speculation on the RD's part.
- The RD states that there is no evidence that the LVNs played any role in determining the range of raises to be given, e.g., 3% for excellent, 1% for fair. (Decision, p. 10, n. 11.) Again, irrelevant. *The LVNs determined the amount of the raise each individual received by virtue of the evaluation they gave; that is, a reward, pure and simple.* The fact that the Employer determined the parameters of the wage increase does not change the fact that the LVNs determined *the particular wage increase given*. Under the RD's theory, a wage increase of 3% is essentially the same as an increase of 1% -- a difference that most employees would find quite significant even if the RD believes the difference to be meaningless.

Finally, the RD seeks to undercut the evidence that, in completing these performance

room and then the Hearing Officer asserted that the Employer had no right to call such an individual as a witness. (Tr: 246-248.)

evaluations, the LVNs used independent judgment. The record was clear that the LVNs were given no instructions on how to complete the forms -- a fact that demonstrates that the Employer was relying on their professional judgment. (Tr: 161.) The LVN, who did testify, Gonzales, explained *in detail* how he went about evaluating the CNAs, clearly *showing* the exercise of independent judgment.

Here is what LVN Gonzales testified to with respect to four of the performance evaluation factors: work quality, initiative, communication, and dependability:

Q. In general, what did you evaluate in terms of work quality? What did you take into consideration?

A. The care of the patients, the effectiveness, the happiness of the patients, the duties that do along with their job. You know, does she do them effectively, really. I mean there either done good or they're not done good. You know, it could say half, half, you know. They don't take the time to do it well, or you know, and that's basically what it is. Their job assignment, they are going to -- you see if they are a good CNA or they're not.

(Tr: 383-384.)

Q Okay. And when you evaluated the CNAs for initiative, what did you take into consideration there?

A You see stuff as an LVN that needs to be done all day long. And some stuff can wait and some stuff can't. Some of the CNAs go out of their way to get stuff done. And others let it go. And they don't. So you know, if you witness working side by side with them, that they are getting this stuff done, then you know, that's how we come to conclusion.

(Tr: 386-387.)

Q. What did you take into consideration in evaluating the communication skills of a CNA?

A If you ever hear from them. Are they quiet their whole shift or do they communicate effectively regarding the patients. And again, I don't expect them to be, you know, so vocal all the time. But I do expect some communication in regards to the patient...

(Tr: 387.)

Q And what did you take into account in evaluating the dependability of a CNA?

A Do I have ask for a counseling with -- in respect to their job duties? Do I need to report

that they're not doing their job? Or do they appear to get their job done, you know, without me having to constantly be asking or taking them their supervisor. ..

(Tr: 388.)

The RD's rejection of this testimony shows her clear desire to find these individuals to be employees regardless of the evidence. Here, the evidence is that the LVNs were given a blank form with specified categories that they were to use to evaluate the CNAs under their supervision. They used their professional judgment to define those categories and then evaluated the CNAs based on that judgment.

Also, missing from the RD's decision is the fact that the uncontroverted record evidence was that that the LVNs were going *to continually evaluate the CNAs' work performance* as each CNA hit his or her "hiring anniversary date" and the evaluation done, at that time, would determine the CNA's *annual* wage increase. (Tr: 44-45, 154.) The RD completely ignores this evidence, and the fact that throughout the year each CNA would receive a wage increase based on the LVNs' evaluations – a practice announced to the LVNs and the CNAs.

In sum, the only way that the RD cannot conclude that the LVNs were not exercising the 2(11) power to "reward" the CNAs is to ignore the record evidence and to rely upon factors having nothing to do with the power exercised by the LVNs. A fair reading of the record leads to the inevitable conclusion that the LVNs were statutory supervisors.

2. THE LVNs ALSO ASSIGNED WORK, DISCIPLINED EMPLOYEES AND EFFECTIVELY RECOMMENDED APPLICANTS TO BE HIRED.

Although the Employer was not required to prove that the LVNs exercised any other Section 2 (11) power, the record evidence also demonstrated that the LVNs disciplined the CNAs, assigned them work, and played an effective role in the hiring process. As previously noted, because the evidence dealing with the LVNs' power to reward is so overwhelming the Employer

will only briefly outline the evidence supporting the other supervisory powers exercised by these LVNs and the flaws in the RD's analysis.

a. The Hiring Process

Another change that Administrator Tolman made at his July 2016 nursing meeting was to advise the LVNs that he intended to involve them in the CNA hiring process. As a result of the change, whenever the DSD had a CNA candidate, she brought a Charge LVN into the hiring interview and had the Charge LVN *conduct* the interview by asking the questions on the "standard" interview form. (Tr: 173-174.) However, the DSD told each of the LVNs that they were free to ask whatever additional questions they wished, and the LVNs did, in fact, ask additional questions. (Tr: 175.) Significantly, at the conclusion of the interview, when they were alone, the DSD asked the LVN his or her opinion as to whether the applicant should be hired. (Tr: 176.)

The evidence shows that the first such interview occurred on August 10, 2016 and continued thereafter. (Employer Exhibit 9.) While not all of the applicants were hired, with respect to one candidate, the record evidence is unrefuted that while the DSD was *not* going to hire the candidate, the DSD changed her mind and hired the candidate based on the LVN's recommendation. (Tr: 176-177, 182-183, 263-264.) The RD dismissed this evidence as "anecdotal".¹¹

Clearly, all the LVNs have yet to demonstrate the integral part they *now* play in the hiring process. But, that is only because the process is *just one month old and the limited number of hiring interviews that have occurred to date*. There simple have not yet been enough hiring interviews to demonstrate that the LVNs will be repeatedly making effective hiring

¹¹ The LVN who conducted the interview and who made the recommendation was Maria Santillan. Ms. Santillan was present on day two of the hearing (Tr: 224), but neither the Union nor the Hearing Officer chose to call her to testify or to rebut the DSD's testimony.

recommendations proving their supervisory status with respect to this factor as well – a fact that the RD chose to ignore. As noted by the Sixth Circuit in *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332 n. 6 (2012) with respect to the analogous situation dealing with limited disciplinary warnings: “We recognize that, in some cases, the infrequency with which purported authority is exercised may be relevant to determining whether such authority was actually vested in the employee. However, *logic dictates that this consideration has limited relevance* when the authority claimed is the authority to discipline, suspend, or terminate *and the frequency of the disciplinary incidents is limited.*” (emphasis added.)¹²

b. The LVNs Routinely Disciplined The CNAs.

The record evidence showed that LVNs routinely issued discipline to the CNAs. LVN Gonzales, *called by the Union to testify*, admitted that he routinely disciplined employees. At a meeting conducted by the Employer and in response to the Employer’s assertion that the LVNs were supervisors, Gonzales unequivocally stated:

“*I have been writing up people for three years, how does that now make me a supervisor.*” (Tr: 359-360.)¹³

Moreover, LVN Gonzales testified that he was told that he, as an LVN, would be subject to discipline if he failed to discipline the CNAs under his supervision. His testimony was as follows:

BY MR. BOIGUES [Union Counsel]: Abel, has anyone in management ever told

¹² Not every individual in a given supervisory classification must actually exercise a power in order for the classification to be determined to be supervisory. As noted in *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550, n.3 (6th Cir. 1992): “It is the existence of [a statutorily listed] authority that counts under the statute, and not the frequency of its exercise.” *See also Caremore, Inc. v. NLRB*, 129 F. 3d 365, 369 (6th Cir. 1997).

¹³ This same LVN, in his testimony, *repeatedly* claimed that the CNAs were *insubordinate* to him when they failed to do as he instructed. (See discussion *infra*, pp. 20-21.) The term “insubordination” is used by a supervisor when describing a subordinate’s failure to follow an instruction.

you that if a CNA fails to perform his or her duties that you would be subject to discipline because of the CNA's failure to perform his or her duties?

A Yes.

Q When did they tell you that?

A It's hard to pinpoint a time. I know Eric told me I would have to, actually this is pretty recent, I would have to write up -- they needed to be written up for an account that happened within the past month.

(Tr: 459-460.)¹⁴

Gonzales' admissions are consistent with the DSD's testimony and the testimony of the facility Administrator. Both testified that they routinely received copies of discipline issued by the LVNs and that, for the most part, simply reviewed them and filed them away. (Tr: 71-72, 90-91, 207.) The DSD testified that she only got involved in reviewing the matter if the CNA complained that the discipline was unfair – an infrequent occurrence.

The DSD did state that with respect to some of the disciplinary forms introduced into evidence, she had instructed the LVN to issue the discipline. However, with respect to most of the disciplinary forms introduced into evidence, the incident that resulted in discipline was information that would only come to the Charge Nurse's attention. For example, a warning issued on July 18, 2016 to CNA Cynthia Montejano states: "Resident had scheduled a shower for p.m. R heard stating he wanted a shower, no shower given. Charge nurse not notified in R refused." (EX 6A.) Obviously, this is information that comes to the attention of the Charge LVN, not the DSD, who is not routinely on the floor caring for residents. The same is true with respect to the incidents reflected on the majority of the disciplines introduced into evidence. (EXs 6B, Fall Prevention; 6C, Leaving Resident Unattended; 6D, Charting Failure; 6E, Refused Direction; 6F Charting Failure;

¹⁴ Here, again, as part of the issuance of the new job description in July 2016, well-before the filing of the representation petition, these specific LVN job duties were emphasized.

6G, Shower Not Given; 6H, CNA sleeping in room at 2 a.m.; 6I, insubordination; 6K, failure to change resident; 6L, soiled bed linens; 6M, failure to dress resident; 6Q, took lunch when not scheduled; 6Z, inappropriate communication with co-workers; 6AA, resident left unattended; 6BB, care failure; 6CC, care failure; 6DD resident left unattended; 6EE, failure to attend to residents; 6FF, ignoring room alarm; and 6GG, failure to care for resident.)¹⁵

c. The LVNs Assigned Work To The CNAs.

The LVNs routinely assigned the CNAs to work in different areas and/or with different residents. For various reasons residents come and go from the facility (admissions, discharges, transfers, and deaths). At other times, CNAs leave work early. These occurrences require that the workload for the existing CNAs be rebalanced. This “re-balancing” is done by the LVNs. The LVNs must re-assign the CNAs to care for different residents. (Tr: 196-201.)¹⁶

Just as significantly, *currently*, the LVNs determine *what areas* each of the CNAs assigned to their Nurses’ Station will work during patient lunch periods. There are 5 distinct assignments: Dining Room, Assisted Dining Room, Floor, Trays, and Trays & Floor. (EX 10; Tr: 196-200, 403-423, 430-446.) A CNA (1) can be assigned *to the dining room* to assist the residents

¹⁵ The only evidence refuting this testimony came from Gonzales who testified that when he issued discipline he “took” the CNA to the DSD, described the incident, and let the DSD make the decision as to what to do. Gonzales asserted that in his five years, he was only involved in 5 to 8 instances of imposing discipline on a CNA. There are two significant problems with this testimony. First, it says nothing about the practice followed *by the other LVNs* and does not refute the DSD’s or Administrator’s testimony that they routinely received disciplinary forms completed by the LVNs (or the DSD’s testimony that some times the LVN would simply notify her that the LVN had issued discipline to a CNA). Second, Gonzales’ assertion that he went to the DSD and allowed her to issue the discipline is contrary to his own admission – given at a time when he did not know the significance of his statement -- that “he had been writing people up for three years...”

¹⁶ Additionally, the DSD testified (and Gonzales’ confirmed) that the LVNs routinely handle the CNAs’ grievances. (Tr: 212-215, 455-456.) CNAs often complain about their workload, the LVNs failure to re-balance the workload, and the assistance, or lack of assistance, from their co-workers. These grievances are routinely resolved by the LVNs.

who are able to feed themselves; (2) can be assigned to work in *the assisted dining room* where the residents cannot feed themselves; (3) can be assigned to distribute dining trays to residents eating in their rooms, (4) can be assigned to continue monitoring the floor; or (5) can be assigned to both the floor area and to assist with trays. Each of these responsibilities occurs *in a different area of the facility* and involves *different residents* and *different duties*.

The night shift LVNs make these assignments for breakfast while the day shift LVNs make the assignments for lunch and dinner. *Id.* The LVNs make these assignments by completing the “daily assignment sheet” and the LVNs are free to assign *any CNA* to any of these areas. (EX 10.) Moreover, these meal periods consume a significant portion of the day.¹⁷ As held by the Fourth Circuit in *Glenmark Associates v. NLRB*, 147 F.3d 333 (1998):

“The authority to assign workers constitutes the power “to put [the other employees] to work when and where needed.” *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981). Such decisions are, in our view, inseverable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well-being. An emergency decision regarding the appropriate staff level to accommodate ill patients requires a fact-specific individualized analysis of not only the patient's condition and the appropriate care, but also of the special skills of particular staff members. The conclusion that the Cedar Ridge LPNs exercise the authority to assign CNAs utilizing their independent judgment is sufficient for us to find that the Cedar Ridge LPNs are supervisors under the act. [Additional citation omitted.]”

The RD disregarded this evidence asserting that there was no evidence that the LVNs exercised “independent judgment” in making these assignments. (Decision p. 7.) In reaching this conclusion, the RD ignored Gonzales’ testimony. To the extent that Gonzales’ was allowed to be

¹⁷ Through Gonzales, the Union demonstrated that on August 15, these assignments were made by the scheduler, not the LVNs. (PX 4.) However, Gonzales testified on cross-examination that *currently* the LVNs were making these assignments. (Tr: 442-443, 446.) Moreover, the documentary evidence showed that LVNs were making these assignments prior to May 2015 (EX 12) and that they have been doing so, again, since August 30, 2016. (EX 13.) *The LVNs’ job duties as of August 31, the date of the petition, are relevant; not the job duties they had in mid-August.*

examined by the Employer's counsel, Gonzales clearly established that the LVNs are responsible for the work done by the CNAs and ultimately responsible for the care that the CNAs give the residents. The CNAs are not free to ignore a directive given them by a LVN. Gonzales testified that when a CNA gave a reason for being unable to comply with the LVN's directive, it was up *to the LVN to accept or reject the CNA's stated justification*. Gonzales' testified:

Q Okay. Focusing on the kind of instructions you give the CNAs

A Uh-huh.

Q -- just in general

A Uh-huh.

Q -- when you give his CNA instruction, do you view it as a mandatory instruction that they're required to follow or they're free to ignore you?

A No, they're not free to ignore me on situations. That's expressed, *that's insubordination. And it goes to their boss.*

Okay. All right. Now if the CNA -- the reason the CNA was free to disregard your Instruction in that case is because the CNA responded I am busy?

A Right, yeah.

Q And you accepted that answer, correct?

A Right, right.

Q What about the CNA doesn't say anything. He just doesn't follow the instruction?

A We have -- *I mean, no, that's insubordination*, too. If she's in front of me and I ask her to help or if she's not busy and she refuses, then I have to take care of.

Q Okay. So you view it either the CNA does what you instructed them to do in that case, or they give you a reason why they can't do it, which you find acceptable?

A Right.

Q Are there other instances where you give instructions to CNAs that you -- that they're free to ignore, other than when they say they're busy.

A No.

(Tr: 403-406.) (emphasis added.)

Unfortunately, because of the rulings issued by the Hearing Officer and interference by the Union's counsel, the record on these subjects (as well as concerning the discipline issued by the LVNs) is not as voluminous as it could or should be. As the reader of the record can ascertain, Gonzales' testimony *on cross-examination* was quickly establishing the supervisory status of the LVNs. *The longer Gonzales' testified, the more helpful he was in demonstrating the various authorities exercised by the LVNs.*

It was the Hearing Officer's responsibility to ensure a complete record, not to truncate witness examinations to meet some arbitrary schedule that the Hearing Officer decided should be met. (Guide p. 7.) Just as significantly, the RD is not now free to rely upon any ambiguities in the record or any assertions that the described supervisory authority is vague. Any such ambiguities or vagueness is solely *because of the Hearing Officer's rulings barring the Employer from adducing relevant evidence* and allowing Union counsel to "hide away" a witness by telling the witness to leave the room so that she could not be called to testify. *See Lakeland Health Care Associates v. NLRB, supra* ("... rather than focusing on this and other evidence of independent judgment before it, the Board's decision on this issue rests entirely on speculative inferences from what the evidence *could* or *might* have shown.")

B. WHEN VIEWED IN CONTEXT, THE NUMBER OF LVNs WHO ARE SUPERVISORS IS CONSISTENT WITH THE FACILITY'S NEEDS AND THE CNA WORKFORCE.

The RD also concluded that if she were to find that the LVNs were supervisors, the supervisor to employee ratio would be “improbably high”, which, therefore, militated against finding the LVNs to be supervisors. (Decision p. 20.) But, the RD’s conclusion is based on a faulty understanding of the “true” ratio. As noted, the facility employs approximately 21.5 full-time LVNs who work a “regular” schedule. (Board Exhibit 3.) In addition, the Employer uses 15 *per diem* LVNs to fill in for absent full time LVNs. *Id.* There are *not* 37 full-time supervising LVNs present in the facility. During a given week, at most, there would be 21.5 supervising LVNs present.

More to the point, because the Charge LVNs are working three 12-hour shifts, usually there were 6 LVNs assigned to the day shift and 4 to 5 assigned to the night shift. In turn, those shift LVNs have to “man” three different nurses stations with, at the most, two LVNs on one station. Thus, there are not a large number of LVNs supervising a small group of CNAs. Even more significantly, these Charge LVNs are not just “sitting around” supervising.

Quite to the contrary, Gonzales described in detail the job duties of a Charge LVN, and as he testified, they were *constantly busy with their own tasks*, such as the Med Pass, along with overseeing their entire area. (Tr: 389-391.) In fact, Gonzales was so busy that he testified *he could not even find 5 free minutes to read his job description*.

That aside, even more significant is the fact that on the present night shift (from 6 p.m. to 6 a.m. and all weekends) the Charge LVNs are the most senior individuals in the facility. Currently, *out of 168 hours in the week, the LVNs are in charge of the facility 132 hours (seven 12 hour shifts and two 24 hour weekend days)*. It defies belief that the LVNs are not supervisors in a

facility where there are no more senior people present than the Charge LVNs to either supervise the LVNs, the CNAs, or the facility's patients.

The Fourth Circuit made precisely this point in *Glenmark Associates Inc. v. NLRB*, *supra* in finding the contrary conclusion ludicrous:

“We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment regarding proper staff levels and patient assignments. The Administrator's testimony cited above confirms that the LPNs are left in total control of the nursing home during evening and weekend hours. Quite obviously many scheduling decisions made “routinely” by the LPNs at Cedar Ridge must require independent judgment. The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think. In the Board's view, LPNs just mechanically follow established procedure. The record before us reveals the fallacy of the Board's logic. Although there is a general procedure in place regarding whom to call to work should an absence occur, on some occasions the LPNs, either the charge nurse or any floor nurse, exercise their independent judgment and decide to operate the nursing home or their floor shorthanded. Record testimony demonstrates that LPNs on the floor have the authority to allow CNAs to leave Cedar Ridge early, and when that occurs they generally reassign the remaining CNAs to ensure adequate patient coverage. In other situations, where the charge nurse is confronted with a floor in which patients are sicker than usual, the charge nurse may make a decision to assign an additional CNA to that area.”

The same analysis is precisely true for this Employer. The Employer is not a factory on “auto” pilot. The facility and its employees take care of, on a 24-hour basis, very sick people who are not capable of caring for themselves. Some one at the facility has to make decisions on a daily and hourly basis on how to care for these individuals and those decisions involve staffing and independent professional judgment. Certainly, in the 132 hours per week where the Administrator, the DON, the ADONs, and the DSD are absent, those decisions, *supervisory decisions*, are being made by the Charge LVNs.

C. THE LVN JOB DESCRIPTION AND WHAT THE CNAs WERE TOLD LEAVES NO DOUBT CONCERNING THE LVNs' SUPERVISORY STATUS.

The LVNs' job description also left no doubt concerning their supervisory powers providing in relevant part:

Develop and distribute resident care assignments to direct care staff...

Perform performance evaluation reviews for staff, including determination of wage increases if applicable.

Correct staff performance and administer discipline, if required.

Take job actions with staff members under appropriate circumstances.”

(EX 1.)

Although the record evidence was crystal clear that this job description was the job description in effect at the relevant time, the RD disregards it asserting that the evidence failed to “conclusively establish” which of three job descriptions was applicable. (Decision p. 21.) This is a bald face distortion of the record evidence.

The Employer's evidence established that EX 1 was put in effect in the summer of 2016. (Tr: 37-38.) While the Union put into evidence a previous job description (as did the Employer), there was no evidence that contradicted the testimony that EX 1 was in effect at the time of the petition.¹⁸

¹⁸ Even more disingenuous is the RD's reliance on this alleged confusion. When the Employer sought to call a witness to “clarify” any confusion surrounding the job descriptions, the Hearing Officer, in consultation with the ARD, barred the Employer from calling the witness. (Tr: 464-465.) The Hearing Officer also barred the Employer from questioning LVN Gonzales on this subject matter. (Tr: 466.) Having prevented the record from being clear, the RD now relies on this claimed ambiguity to disregard record evidence.

Similarly, the record was crystal clear that the CNAs were told that the LVNs were their supervisors (and as noted, LVN Gonzales, in his testimony, repeatedly referred to the CNAs' conduct as being "insubordinate"). (Tr: 48-51.) Nonetheless, the RD rejects this testimony as non-dispositive. While technically true, the fact that the CNAs were told that the LVNs were their supervisors is relevant because it is an indicia of supervisory authority. Moreover, what is even more relevant is the *LVNs' view that they were supervisors*.

IV. CONCLUSION

The record evidence demonstrates that the LVNs were Section 2(11) supervisors. The RD's contrary decision is based on her rejection of the evidence and her application of newly created evidentiary rules that have no basis in law. The Board should grant this Request for Review and find that the LVNs are statutory supervisors.

Dated: November 15, 2016

Respectfully Submitted,

s/ Henry F. Telfeian

Law Office of Henry F. Telfeian

By: Henry F. Telfeian

Attorney For Employer

CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury under the laws of the United States, that on this date I have served a true and correct copy of EMPLOYER'S REQUEST FOR REVIEW in Case No. 32-RC-183272 via electronic filing through the National Labor Relations Board's website, www.NLRB.gov, upon:

Valerie Hardy-Mahoney
Acting Regional Director, Region 32
National Labor Relations Board
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

EMPLOYER'S REQUEST FOR REVIEW was also served, via electronic mail, upon counsel of record for the Petitioner, as follows:

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This 15th day of November 2016

s/ Henry F. Telfeian

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